



The State Bar of California

Task Force on Access Through Innovation of Legal Services – Subcommittee on Artificial Intelligence and Unauthorized Practice of Law

Comments to Subcommittee Reports for the January 18 Meeting

To: Subcommittee on Artificial Intelligence and Unauthorized Practice of Law
From: Prof. Kevin Mohr
Date: January 15, 2019
Re: ATILS - UPL/AI Subcommittee - Comments

I have some brief comments/questions on the memoranda prepared by members of the UPL/AI subcommittee.

A. Chang memo on what constitutes the practice of law ("POL"):

1. The Birbrower approval of the Merchant Protective Corp. definition appears to sanction an understanding the POL includes not only legal services provided in relation to litigation, but also legal services in transactional matters, at least where a lawyer is performing those services (non-lawyers regularly engage in "legal instrument and contract preparation" on behalf of their entity employers, not to mention negotiating the terms of such instruments).
2. Is it possible that implementing AI-assisted legal services could ultimately lead to POL being limited to appearances by an advocate in court, similar to the approaches we now see in the medical profession, i.e., physician assistants and nurse practitioners authorized to examine patients, diagnose and prescribe medications and/or treatment, but surgery remaining limited to the province of physicians? I'm not suggesting this would be the end of "non-Barrister" lawyers. After all, I'm regularly seen by non-surgeon physicians at my medical group. I'm merely observing that the concept of POL might become more fluid to enhance access to justice.
3. To date, have AI processes/solutions had an effect on the provision of legal services by Solicitors (vs. Barristers) in the UK or Australia?

B. Rubin Memo on AI dated 1/6/19:

1. The provision of general legal information is not the practice of law ("POL"). It is when one tailors the information provided to the specific set of facts inputted that the information provided to the inquirer might become legal advice. To use the examples in the memo, to describe changes made to Yahoo's terms of service is not legal advice. To explain the impact those same terms of service would have on an inquirer's proposed course of conduct would be providing legal advice and be the POL. To send a form NDA to an inquirer is not POL. To modify a form NDA to address an inquirer's specific objective and concerns, however, would be. As for asking Legal Robot to "analyze" Megacorp's contract against previous agreements, the question is what is meant by the word "analyze." If the analysis simply involves a descriptive comparison of the previous agreements, it would appear to be no more than a verbal red-line (i.e., similar to Word's Track Changes). If "analyze" means something more, i.e., includes not only a comparison but an explanation of the potential legal or economic consequences of including the new terms, then that would be POL.
2. With respect to providing protections to non-lawyer legal service providers that are similar to those provided to lawyer-client communications, it is important to recognize that it is the lawyer-

client communication that is privileged, not the underlying facts. Submission of information to a non-lawyer legal service provider would be analogous to a lawyer-client communication, but ultimately the client would be required to testify to respond to discovery requests as to facts. Neither the lawyer nor the client, however, could be compelled to disclose the communication. Regardless, given the importance of transparency recognized in all of the memos submitted by the different subcommittees, it would be crucial for nonlawyer service providers to have similar protections. Otherwise, their disclosure that communications were not confidential would likely discourage potential users of their services.

- a. In Washington, ACP (attorney-client privilege) protections were extended to Limited License Legal Technicians ("LLLT") by a rule of court, APR ("Admission to Practice Rule") [28\(K\)\(3\)](#).
- b. In California, however, the ACP is governed by statute, Evid. Code §§ 950 et seq. As the courts can neither create new privileges nor exceptions to existing privileges, HLC Properties, Ltd. v. Superior Court (2005) 35 Cal.4th 54, 59-60, extending such protections would require legislative action.

C. Raby memo on "Safe Harbor" (and Rubin discussion at page 5 of the 1/6/19 memo):

1. This proposal appears to be a requirement that the legal service provider be registered with the State Bar, similar to the registration requirements currently in effect for legal services attorneys and in-house counsel under Rules of Court 9.45 and 9.46, respectively.
2. If it is determined that this is an appropriate approach to encouraging participation in the California legal market, then looking to those regulatory frameworks and the experience the Bar has had in regulating those lawyers might prove fruitful.

D. Some other regulatory issues. As we go forward in considering AI alternatives/solutions for the delivery of legal services, there are some regulatory issues we should keep in mind. Under the aforementioned rules of court concerning registration of legal services attorneys and in-house counsel identified in C, above, a requirement for registration is that the person already be a lawyer in good standing in another jurisdiction. That means that the person is already subject to a set of rules of the jurisdiction under which he or she is licensed to practice. In addition, by registering the person submits to the jurisdiction of the State Bar and being regulated under the CRPCs and State Bar Act.

1. We will need to focus on whether any nonlegal service provider will also be subject to the Bar's jurisdiction and governed by the CRPCs and other laws regulating lawyers in California, or whether a specific set of rules will be required, either in addition to or in place of the CRPCs.
2. In addition to CRPC 5.4 (sharing of legal fees w/ nonlawyers; ownership in firm providing legal services, etc.), some areas we would probably need to explore include:
 - a. Requirement of maintaining a trust account and depositing advance fees in the trust account. CRPC 1.15.
 - b. Conflicts of interest rules. CRPC 1.7 through 1.10.
 - c. Competence & diligence. CRPC 1.1 & 1.3.
 - d. Communication duties. CRPC 1.4.
 - e. Advertising & solicitation. CRPC 7.1 through 7.5.
 - f. Duties owed prospective clients (particularly confidentiality). CRPC 1.18.
 - g. Sale or merger of company. Compare CRPC 1.17.
 - h. Discrimination & harassment. CRPC 8.4.1.